Filed 12/28/15 In re J.R. CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re J.R., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. J.R., Defendant and Appellant.	A143163 (Alameda County Super. Ct. No. SJ12019842-01)

INTRODUCTION

Minor J.R. appeals from the juvenile court's disposition order following his admission that he stole a cell phone from another person. (Welf. & Inst. Code, § 602;[1] Pen. Code, § 487, subd. (c).) On appeal, he challenges the validity and constitutionality of a probation condition requiring him to disclose all passwords to electronic devices under his control. He also argues the probation condition poses a risk of illegal eavesdropping under the California Invasion of Privacy Act (Pen. Code, § 630 et seq.). The identical or very similar probation condition, imposed by two different judges of the Juvenile Court of Alameda County bench, has been the subject of at least four published opinions by different divisions of this court. (*In re Ricardo P.* (2015) 241 Cal.App.4th

[1] Unless otherwise indicated, all undesignated statutory references are to the Welfare and Institutions Code.

676 (*Ricardo P.*); *In re Malik J.* (2015) 240 Cal.App.4th 896 (*Malik J.*); *In re Erica R.* (2015) 240 Cal.App.4th 907; *In re Patrick F.* (2015) 242 Cal.App.4th 104 (*Patrick F.*)[2] While these cases rely on different rationales and craft different dispositions, all four agree the probation condition cannot stand as written. We will follow *Ricardo P.* in finding the probation condition valid under *People v. Lent* (1975) 15 Cal.3d 481, 485 (*Lent*) but unconstitutionally overbroad. Accordingly, we will modify the probation condition and, as modified, affirm the judgment.

STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

First Petition.

J.R. came to the attention of the juvenile court at the age of 14, after he was stopped by police while driving a stolen car. A wardship petition under section 602 was filed and, on October 31, 2012, the minor admitted misdemeanor receiving stolen property. J.R. was adjudged a ward of the court, placed on probation, and released from juvenile hall to his mother on electronic monitoring. In January 2013, a supplemental wardship petition (§ 777) was filed alleging the minor violated his electronic monitoring condition. Following juvenile hall detention, the court continued the wardship and released J.R. to his father on electronic monitoring. In March 2013, another supplemental petition was filed alleging J.R. continued to violate his electronic monitoring condition and he was again ordered detained in juvenile hall. The court

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[2] Shortly before oral argument, minor's counsel informed the court that minor had been committed to the Department of Juvenile Justice (DJJ) in another case and, as a result, this appeal *may* be technically moot because the juvenile court loses the authority to impose conditions of probation once it commits a ward to the DJJ. (*In re Edward C.* (2014) 223 Cal.App.4th 813, 829.) The Attorney General agrees. However, neither party has provided the court with any information from which we can determine what actually took place. In this case, we exercise our inherent discretion to resolve issues which may have been rendered moot by subsequent events because the questions to be decided are of continuing public importance and yet are capable of repetition and evading review. (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1404.)

continued the wardship and released J.R. to his mother on electronic monitoring. After a third violation of the same condition, the court placed J.R. on home supervision.

Second Petition.

On May 12, 2013, police observed the minor driving a stolen car. He failed to stop at two stop signs, collided with another car, and drove away. Police arrested defendant after a short foot chase. A subsequent wardship petition under section 602 was filed and, on May 15, 2013, the minor admitted a felony violation of Vehicle Code section 10851, unlawfully taking or driving a vehicle. The court ordered J.R. detained in juvenile hall and continued the wardship. J.R. was released to his mother's home on August 14, 2013, on home supervision.

Third Petition.

On September 11, 2013, J.R. and another individual followed a minor who was walking home from school, listening to music on his headphones. When J.R. and the other individual told him to "come here," the minor ran, pursued by J.R. and his confederate. They demanded the minor give them his phone. J.R. punched the minor, causing him to drop his phone to the ground. Later the same day, police observed J.R. driving a stolen car and arrested him after he stopped at a gas station. He fled from police but was eventually detained. The phone stolen earlier in the day was found on the ground along his flight path. Police called the owner of the phone, who later identified J.R. as the person who robbed him. A subsequent wardship petition was filed alleging J.R. committed robbery and vehicle theft. (§ 602; Pen. Code, § 211; Veh. Code, § 10851.) On September 16, 2013, J.R. admitted felony vehicle theft and the lesser charge of felony grand theft (Pen. Code, § 487). The court ordered juvenile hall detention pending placement at Teen Triumph.

On November 12, 2013, the minor was placed with Teen Triumph. He completed that program in August 2014 and was returned to his mother's home.

The Challenged Probation Condition.

On September 18, 2014, the court continued J.R.'s wardship and home placement with a referral to the Family Preservation Unit on the condition, among others, that he "[s]ubmit [his] person and any vehicle, room or property, *any electronics with passwords under* [*his*] *control* to search by Probation Officer or peace office[r] *with or without search warrant* at any time of day or night."[3] (Italics added.)

Defense counsel objected "to the condition of the search clause, which requires [J.R.] to give up his passwords and have his electronic and social media searched." He argued it was not a prior condition of probation and there was no "change in circumstance that would allow the court to impose the more onerous condition of probation at this time." The court responded that previously no such search condition was necessary because a "search warrant was not needed to search electronics of minors, and now the Supreme Court has indicated a search warrant is needed." Furthermore, '[i]n this particular case, in order to properly supervise the Minor, his electronics need to be examined. He had some issues with regards to drugs. He's had some issues with regards to the sexual offenses,[4] and I find that—typically, minors who are involved with drugs do post themselves showing their drugs, paraphernalia, and themselves actually even smoking, using drugs. In order to properly supervise him, we need to have his electronics searched. Your objection is noted for the record." When counsel protested there was no factual basis in the record to justify imposition of that condition of probation, the court stated: "He said [he] smoked marijuana, disrespecting staff/peers, failing to follow program rules. [¶] . . . [¶] This is just from my experience rather than evidence that he has specifically done that. That's clear on the record."

This timely appeal follows.

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[3] The court's *oral* pronouncement of the condition is worded slightly differently than the probation order signed by the judge, but both convey the same meaning.

[4] Our review of the record on appeal did not reveal any sexual offenses.

DISCUSSION

***The Probation Condition Is Valid Under* Lent.**

As an initial matter, and for the reasons stated in *Ricardo P., supra*, 241 Cal.App.4th 676, we construe the word "electronics" in the search condition to mean "electronic devices," including "both the physical device and the *data* contained on the device" and to "encompass[] not just data stored on electronic devices themselves but also electronic accounts, such as social media accounts, that, while not stored on electronic devices, can be accessed through them." (*Ricardo P.*, at p. 682.) The minor acknowledges the juvenile court has broad—though not limitless—discretion to impose reasonable probation conditions on a minor. (§ 730, subd. (b); *People v. Keller* (1978) 76 Cal.App.3d 827, 832, overruled on another point in *People v. Welch* (1993) 5 Cal.4th 228, 237.) Under *Lent, supra*, 15 Cal.3d 481, a probation condition is invalid if it " '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' " (*Id.* at p. 486.) *Lent* applies to juvenile probation. (*In re T.C.* (2009) 173 Cal.App.4th 837, 847.) "[A]ll three prongs must be satisfied before a reviewing court will invalidate a probation term." (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) Defendant nevertheless argues the challenged condition is unreasonable under *Lent* because his underlying conduct did not involve his use of electronics or social media, use of electronics or social media is not itself criminal, and requiring him to turn over his passwords to his electronic devices and social media sites is not reasonably related to his future criminality. We disagree.

We acknowledge the second prong of *Lent*, *supra*, 15 Cal.3d 481 is met here because " 'typical use of electronic devices . . . is not itself criminal.' " (*Ricardo P., supra*, 241 Cal.App.4th at p. 685.) However, the first and third prongs of *Lent* cannot be met here. First, while it is true the minor's conduct did not involve his use of social media, the search condition is reasonably related to his most recent offense, which

involved the theft of an electronic device, a cell phone. Moreover, the minor's mother stated he did not own a cell phone. Therefore, searching any cell phone found in the minor's possession, to determine whether the cell phone was stolen, would be reasonable. Passwords might or might not be necessary to make this determination.

Finally, *People v. Olguin*, *supra*, 45 Cal.4th 375, controls here. *Olguin* holds a probation condition "that enables a probation officer to supervise his or her charges effectively" (*id.* at pp. 380–381) is reasonably related to future criminality even if the condition has no relationship to the crime of which a defendant was found guilty (*ibid.*). In this case, the minor admitted he started smoking marijuana with friends at the age of 14. As recently as one month before the court hearing at which the search condition was imposed, a program clinician for Teen Triumph noted that J.R. "ha[d] a long history of substance abuse and seems to be self-medicating his ADHD symptoms with marijuana." We agree with *Ricardo P.* that the electronics search condition "enables peace officers to monitor and enforce compliance" with J.R.'s other probation conditions, such as not associating with known users, possessors and dealers of illegal drugs, and not using or possessing illegal drugs by "allowing text messages or Internet activity to be reviewed to assess whether [the minor] is communicating about drugs or with people associated with drugs." (*Ricardo P.*, *supra*, 241 Cal.App.4th at p. 686.)

The Probation Condition Is Overbroad.

J.R. argues the probation condition is overbroad because it infringes on his constitutional rights to privacy and expression but is not narrowly tailored to serve the interests of public safety or his individual rehabilitative needs. (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1084.)[5] We agree. Even assuming J.R.'s constitutional rights are

[5] To the extent J.R.'s arguments suggest the type of search condition here is facially overbroad, no specific objection is required to preserve the issue for appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 885.) To the extent the minor argued below the search condition was not justified by a change of circumstances or grounded in a factual basis,

"significantly more limited than they would be if [he] were an adult or were not on probation[,] . . . the electronics search condition is not narrowly tailored to avoid unnecessary infringement of those rights." (*Ricardo P., supra,* 241 Cal.App.4th at p. 690.) As we explained in *Ricardo P.*, "the electronics search condition is overbroad because it is not 'narrowly tailored for the purposes of public safety and rehabilitation' and 'is not narrowly tailored to [him] in particular.' The juvenile court's stated purpose in imposing the condition was to permit monitoring of [the minor's] involvement with illegal drugs, particularly marijuana. But the condition, as we and the parties have interpreted it, does not limit the types of data on or accessible through his cell phone that may be searched in light of this purpose. 'Mobile application software on a cell phone, or "apps," offer a range of tools for managing detailed information about *all aspects* of a person's life,' including financial, medical, romantic, and political. (*Riley v. California*[(2014)] 573 U.S. at p. ___ [134 S.Ct. [2473,] 2490], italics added.) The information that might be contained in [the minor's] electronic accounts is similarly broad. The condition therefore permits review of all sorts of private information that is highly unlikely to shed any light on whether [the minor] is complying with the other conditions of his probation, drug-related or otherwise. As a result, we conclude that it is not narrowly tailored to accomplish [the minor's] rehabilitation." (*Ricardo P.*, at pp. 689–690.) However, for the reasons stated in *Ricardo P.*, we think a more narrowly circumscribed electronics condition is warranted. We do not agree with *Malik J., supra,* 240 Cal.App.4th 896, that disabling an electronic device's internet or cellular access, or preventing its forensic examination, is necessary or desirable. (*Ricardo P.*, at p. 691.) That is particularly true here, where "searching [remote data or retrieving deleted information] may be helpful not only in determining whether the minor has stolen a particular device but also in

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we think he sufficiently preserved an overbreadth claim "premised upon the facts and circumstances of the individual case." (*Ibid.*)

monitoring whether the minor has stolen or is stealing other devices." (*Ibid*.) We therefore decline to adopt *Malik J.*'s modification of the probation condition.

Penal Code section 632.

The minor also argues the challenged probation condition must be stricken because it "poses a risk of illegal eavesdropping under the California Invasion of Privacy Act" (hereafter the Act) (Pen. Code, § 630 et seq.) In *Ricardo P.*, this court did not address the merits of a Penal Code section 632 challenge to the probation condition, because the minor argued the probation condition violated the privacy rights of *others*, and this court found he lacked standing to pursue that claim. (*Ricardo P.*, *supra*, 241 Cal.App.4th at p. 683.) In *Malik J.*, the court declined to address the argument because of its disposition of the minor's constitutional overbreadth claim. (*Malik J.*, *supra*, 240 Cal.App.4th at p. 904, fn. 2.) In this case, the minor mainly focuses on the ways the challenged probation condition threatens *his* statutory right to privacy under the Act. We therefore address the merits of the argument, except to the extent J.R. incidentally argues the probation condition also violates the statutory privacy rights of others, which we decline to address for lack of standing.

Penal Code section 632[6] "prohibits eavesdropping or intentionally recording a confidential communication without the consent of *all* parties to the communication."

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[6] Penal Code section 632 provides, in relevant part: "(a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. . . . [¶] (b) The term 'person' includes . . . an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording the communication. [¶] (c) The term 'confidential communication' includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it

(*Coulter v. Bank of America* (1994) 28 Cal.App.4th 923, 928.) The Act makes it illegal "for any person to eavesdrop on any confidential communication by means of any amplifying or recording device." (*People v. Ratekin* (1989) 212 Cal.App.3d 1165, 1168.) " 'Eavesdropping' . . . refers to the surreptitious overhearing of conversations." (*People v. Drennan* (2000) 84 Cal.App.4th 1349, 1357.) We accept without deciding, for the purposes of J.R.'s argument, that the Act encompasses electronic communications such as Yahoo! chat dialogues with another person (*People v. Nakai* (2010) 183 Cal.App.4th 499, 512), emails (*In re Yahoo Mail Litig.* (2014) 7 F.Supp.3d 1016, 1020), and text or other social media messages (*R.S. v. Minnewaska Area Sch. Dist. No. 2149* (2012) 894 F.Supp.2d 1128, 1142.)

The Act does not apply to "a communication . . . in any . . . circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded" (Pen. Code, § 632, subd. (c)) or to law enforcement officers or those, such as probation officers, who may be acting under their direction. (Pen. Code, § 633; *People v. Towery* (1985) 174 Cal.App.3d 1114, 1126–1129.)

The minor correctly points out that, as a juvenile probationer, he did not "consent" to a probation condition. (*In re Tyrell J.* (1994) 8 Cal.4th 68, 82, overruled on another point in *In re Jaime P.* (2006) 40 Cal.4th 128, 139.) But that fact does not invalidate the probation condition under the Act. The probation condition at issue here does not entail or permit "eavesdropping," i.e., "a 'real time' interception of a communication, by which the perpetrator listens to the communication as it occurs" or "a mechanical recording of a

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to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded. [¶] (d) Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding."

communication for later playback." (*People v. Drennan, supra,* 84 Cal.App.4th at p. 1356.) Any recording was initially made by the minor himself. " '[A] substantial distinction has been recognized between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device.' " (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 775, quoting from *Ribas v. Clark* (1985) 38 Cal.3d 355, 360–361.) Nor does the probation condition permit or entail intercepting messages. (*State v. Hinton* (2014) 179 Wash.2d 862, 873.) To the extent the minor argues "there is a risk that the probation or police department could intercept, view, and record" his social media communications remotely, we note that Penal Code section 633 would permit such activity.

Finally, J.R. ignores that, as a probationer with a search condition, he has a diminished expectation of privacy, although he "retains a reasonable expectation the officers will not undertake a random search supported by neither reasonable suspicion of criminal activity nor advance knowledge of the search condition." (*In re Jaime P., supra,* 40 Cal.4th at p. 134.) Moreover, " '[t]he level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search [condition] is on notice that his activities are being routinely and closely monitored.' " (*People v. Ramos* (2004) 34 Cal.4th 494, 506.) In our view, defendant's probationary status qualifies as a "circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded" (Pen. Code, § 632, subd. (c)) and is excluded from the statute. For these reasons, we conclude a minor probationer's statutory right to privacy in his communications is no greater than his constitutional right to privacy.

DISPOSITION

The minute order is modified to read: "Submit your person and any vehicle, room or property under your control to a search by the probation officer or peace officer, with or without a search warrant, at any time, day or night. Submit all electronic devices under your control to a search of any text messages, voicemail messages, call logs, photographs, email accounts and social media accounts, with or without a search warrant, at any time of the day or night, and provide the probation officer or peace officer with any passwords necessary to access the information specified above on the electronic device."[7] As modified, the judgment is affirmed.

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DONDERO, J.

We concur:

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HUMES, P.J.

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BANKE, J.

[7] We adopt the language used by the court in *Patrick F.*, *supra*, 242 Cal.App.4th at p. 115.